

Factual Background

2. Jensen was a winning bidder in FM Auction No. 37, Case No. MMFM131A. Under the FCC's written instructions to auction winners, Jensen electronically filed a long form FCC 301 application on January 3, 2005 and paid a filing fee of \$2,980.00 (fee code MTR) as indicated on the Media Bureau fee schedule effective August 10, 2004.

3. As it turned out, the Media Bureau's instructions as to the payment of the fee was contrary to 47 C.F.R. §1.2107(c) in effect at the time. On March 8, 2006, the following was the operative language of Section 1.2107(c):

A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder. **Notwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications.** [emphasis supplied]

4. Jensen's request was premised upon the grant of a similar refund request made by letter from the late Lauren A. Colby, Esquire dated October 21, 2009 on behalf of her client Mildred R. Porter (Boligee, Alabama). This request was granted without any accompanying order or ruling; a refund check was sent by the FCC to Ms. Porter (see Exhibit B). Jensen argued that, as Mr. Colby pointed out, an agency such as the FCC is bound by its own rules, ***Service v. Dulles***, 354 U.S. 363 (1957).

Therefore, the FCC had no right to collect a filing fee from Jensen in 2006 when Section 1.2107(c) of the FCC's rules specifically provided that the filing fee need not be paid. Accordingly, Jensen is entitled to a refund of her \$2,980.00 filing fee.

5. The CFO denied Jensen's request, stating that the Porter refund was erroneously made and that the FCC would be seeking to recover the money refunded to her. The CFO's letter ruling explained that, pursuant to paragraph 164 of **Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, First Report and Order**, 13 FCC Rcd 15920, 15923 (1998), it has been the FCC's intention all along to collect an FCC Form 301 "long form" application filing fee. Notably, the CFO did not discuss Section 1.2107(c) of the Rules in the March 27 letter ruling. The CFO's position appears to be that FCC public notices "trump" agency regulations published in the Federal Register and in the Code of Federal Regulations, and that it is not bound by the four corners of Section 1.2107(c) as in effect at the time.

6. As it turned out, the Commission has tacitly acknowledged the correctness of Jensen's claim when it published a correction to the text of Section 1.2107(c) of its rules in the Federal Register on March 27, 2013--the date of the letter ruling. **Implementation of Competitive Bidding for Commercial Broadcast**

and Instructional Television Fixed Service Licenses, 78 FR 18527-01, 2013 WL 1209824 (Wednesday, March 27, 2013, to be made effective April 26, 2013). As this is written, the new rule- which took the FCC over fourteen-and-one-half years to formulate- has not yet become effective. The March 27, 2013 Federal Register publication was not the result of a notice and comment rulemaking proceeding, and does not indicate whether the five commissioners voted on it.

Legal Discussion

7. The ruling statutory and appellate case law is 100% adverse to the CFO's ruling in this matter. Federal agency actions which are arbitrary, capricious and/or contrary to statute are reversible upon appeal. 5 U.S.C. §706(2)(a). The Administrative Procedure Act, 5 U.S.C. §553, requires agencies such as the FCC to hold notice and comment rulemaking proceedings prior to amending their rules. **Paralyzed Veterans of America v. D.C. Arena L.P.**, 117 F.3d 579 (D. C. Cir. 1997). The public is entitled to rely on the actual published rules of the FCC, and the FCC is obligated to comply with its own rules. **Way of Life Television Network, Inc. v. FCC**, 593 F.2d 1356, 1359 (D.C.Cir.1979).

8. The applicable precedent concerning attempted amendments to agency rules is stated in **Northeast Hosp. Corp. v. Sebelius**, 657 F.3d 1, 13-14 (D. C. Cir. 2011):

It is well settled that an agency may not promulgate a retroactive rule absent express congressional authorization. See **Bowen v. Georgetown Univ. Hosp.**, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). Rulemaking, moreover, "includes not only the agency's process of formulating a rule, but also the agency's process of modifying a rule." **Alaska Prof'l Hunters Ass'n v. FAA**, 177 F.3d 1030, 1034 (D. C. Cir. 1999); see also 5 U.S.C. §551(5) ("['R]ule making' means agency process for formulating, amending, or repealing a rule[.]"); **Paralyzed Veterans of America v. D.C. Arena L.P.**, 117 F.3d 579, 586 (D. C. Cir. 1997) ("Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to 'repeals' or 'amendments.'(emphasis omitted)). Thus, the rule against retroactive rulemaking applies just as much to amendments to rules as to original rules themselves.

To determine whether a rule is impermissibly retroactive, "we first look to see whether it effects a substantive change from the agency's prior regulation or practice." **Nat'l Mining Ass'n v. Dept of Labor**, 292 F.3d 849, 860 (D. C. Cir. 2002). If the rule departs from established practice, we then examine its impact, if any, on the legal consequences of prior conduct. A rule that "alter[s] the *past* legal consequences of past actions" is retroactive; a rule that alters only the "future effect" of past actions, in contrast, is not. **Mobile Relay Assocs. V. FCC**, 457 F.3d 1, 11 (D. C. Cir. 2006) (quoting *Bowen*, 488 U.S. at 219, 109 S.Ct. 468 (Scalia, J., concurring)) (internal quotation marks omitted). Put differently, "[i]f a new rule is 'substantively inconsistent' with a prior agency practice and attaches new legal consequences to events completed before its enactment, it operates retroactively." **Arkema, Inc. v. EPA**, 618 F.3d 1, 7 (D. C. Cir. 2010).

9. We would note here that there is currently a petition pending at the United States Court of Appeals for the District of Columbia Circuit by a number of parties similarly situated to Jensen. **In re Legacy Communications LLC et al**, Case No. 13-1013. Should the Court of Appeals order refunds of FCC Form 301 application filing fees to these "auction winners", a similar result must obtain in Jensen's case.

Conclusion

10. It is clear that the March 27, 2013 Federal Register publication would alter the past legal consequences of past FCC actions. The CFO's denial of the Jensen refund request constituted illegal retroactive amendment of its published regulations. The FCC was obligated under the **Northeast** case to hold a notice and comment rulemaking proceeding before amending its published regulations. Pursuant to Section 1.2107(c) of the FCC Rules in existence at the time the FCC collected the application fee from Jensen, the FCC was not entitled to said fee. Jensen is lawfully entitled to a full refund of said fee.

WHEREFORE, Janet Jensen urges that her Petition for Reconsideration **BE GRANTED** and that the Commission issue the refund to which Jensen is entitled as soon as possible.

Respectfully submitted,

JANET JENSEN



By _____

Dennis J. Kelly
Her Attorney

LAW OFFICE OF DENNIS J. KELLY
Post Office Box 41177
Washington, DC 20018
Telephone: 202-293-2300

DATED AND FILED: April 24, 2013

EXHIBIT A

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

Ms. Janet Jensen
801B North Garfield
Marion IL 62959

Re: File No. BNPH-20050103AEZ
FRN 0011351517

Dear Ms. Jensen:

This responds to your July 28, 2011 request for refund of a \$2,980.00 application fee paid in conjunction with the filing of a long form construction permit application (FCC Form 301) following the conclusion of Auction No. 37. For the reasons stated below, payment of the fee was correct and no refund is warranted.

You contend that no filing fee was required pursuant to section 1.2107(c) of the rules, which states that high bidders in spectrum auctions need not submit an additional application fee notwithstanding any other provision of our rules. Section 1.2107(c) is one of the uniform competitive bidding rules that the Commission adopted in 1997 for non-broadcast spectrum auctions. *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Proposed Rulemaking in WT Docket No. 97-82 and ET Docket No. 94-32*, 13 FCC Rcd 374 (1997) (*Third Report and Order*). The Commission stated that the rules adopted in the *Third Report and Order* would apply to all auctionable services, unless the Commission determined that with regard to particular matters the adoption of service-specific rules was warranted. *Id.* at 382.

The Commission subsequently adopted service-specific rules for broadcast service auctions in 1998, and stated that those rules would apply to all broadcast service auctions. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, First Report and Order*, 13 FCC Rcd 15920, 15923 (1998) (*Broadcast Auction Report and Order*). At paragraph 164 of the *Broadcast Auction Report and Order* the Commission stated that winning bidders' Form 301 applications should be filed pursuant to the rules governing the relevant broadcast service and according to any procedures set out by public notice, and specifically stated that the statutorily established application fees would apply to the long-form applications filed by winning bidders. *Id.* at 15984.

The Public Notice issued after the close of Auction 37 provided that "In accordance with the Commission's rules, electronic filing of FCC Form 301 must be accompanied by the appropriate application filing fee," and referenced the fee requirement contained in Paragraph 164 of the *Broadcast Auction Report and Order*. *Auction of FM Broadcast Construction Permits Closes*, 20 FCC Rcd 1021, 1025 (2004) (*Auction 37 Closing Notice*). In compliance with the *Broadcast Auction Report and Order* and the *Auction 37 Closing Notice*, you paid the fee at the prescribed time and in the correct amount. This demonstrates that you had actual and timely knowledge of the requirement that winning bidders in media

service auctions must pay the prescribed application fee when filing a Form 301 long-form construction permit application. A party with actual and timely notice of a requirement is bound by its terms. See *United States v. Mowat*, 582 F.2d 1194, 1201-02 (9th Cir. 1978); *United States v. Aarons*, 310 F.2d 341, 348 (2nd Cir. 1962).

We also note your reference to the fact that a refund of a Form 301 application fee had previously been made to a winning bidder in a media service auction and your argument that such refund constitutes a direct precedent for granting this refund request. The refund you cite was made in error and the Commission is seeking return of the refunded amounts to assure that all winning bidders in broadcast auctions comply with the fee payment requirement adopted in the Broadcast Auction Report and Order and promulgated in the auctions' closing Public Notices. Absent a statutory barrier, not present here, the Government must recover funds which its agents have wrongfully, erroneously, or illegally paid. *United States v. Wurts*, 303 U.S. 414, 415-16 (1938); *Amtec Corp. v. United States*, 69 Fed. Cl. 79, 88 (2005), *aff'd*, 239 Fed. Appx. 585 (Fed. Cir. 2007); *Aetna Casualty and Surety Co. v. United States*, 208 Ct. Cl. 515, 526 F.2d 1127 (Fed. Cir. 1975), citing *Fansteel Metallurgical Corp. v. United States*, 172 F.Supp. 268, 270 (Ct. Cl. 1959) ("When a payment is erroneously or illegally made...it is not only lawful but the duty of the Government to sue for a refund thereof..."). Moreover, the erroneous refund made in this case neither binds the Commission in this matter nor requires it to make further refunds. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 428 (1990); *Vernal Enterprises, Inc. v. FCC*, 335 F.3d 650, 665 (D.C. Cir. 2004); and see *WLOS TV, Inc. v. FCC*, 932 F.2d 993, 995 (D.C. Cir. 1991) (Commission may depart from policy set in a previous adjudication if it provides a reasoned analysis showing that a prior policy is being deliberately changed, not casually ignored).

For these reasons your request for refund of the application fee is denied.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Mark Stephens', with a long horizontal flourish extending to the right.

Mark Stephens
Chief Financial Officer

EXHIBIT B

LAUREN A. COLBY
ATTORNEY AT LAW
POST OFFICE BOX 113
FREDERICK, MARYLAND 21705-0113

October 21, 2009

10 EAST FOURTH STREET
FREDERICK, MARYLAND 21701-5257

TELEPHONE
301-663-1086
FACSIMILE
301-695-8734
E-MAIL
lac@lcolby.com

BY HAND

Mr. Steven VanRoekel
Managing Director
Federal Communications Commission
The Portals
445 Twelfth Street SW
Washington, DC 20554

Dear Mr. VanRoekel:

On October 19, 2009, this office filed an application on behalf of Mildred R. Porter for a construction permit for a new FM broadcast station at Boligee, Alabama. Pursuant to the Commission's *Public Notice*, DA 09-2063, released September 18, 2009, I paid a filing fee of \$3365.00.

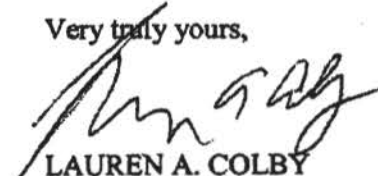
The Commission's Rules, however, are plain and explicit that the winner of an auction is not required to pay a filing fee. Section 1.2107(c) of the Commission's Rules, 47 C.F.R. Section 1.2107(c), which was in effect at the time of the last FM auction and has never been changed, reads as follows:

"A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder. Notwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications..."

Mr. VanRockel
October 21, 2009
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An agency is bound by its own rules, *Service v. Dulles*, 354 U.S. 363 (1957). That being true, the Commission is obligated to obey Section 1.2107(c), unless and until the rule is changed or deleted in accordance with the procedures set forth in the *Administrative Procedures Act*. That has not happened. Accordingly, Ms. Porter is entitled to a refund of her \$3365.00 filing fee, and I request that such a refund be promptly sent.

Very truly yours,



LAUREN A. COLBY
Attorney

LAC/tdm

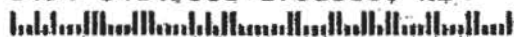
cc: Ms. Lisa Scanlan (Via Email)
Ms. Mildred R. Porter

United States Treasury ¹⁵⁻⁵¹000 G 041,962,378



Pay to
the order of

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3151 04845300 27000001 M2



LAUREN A COLBY ESQ.
C/O MILDRED R PORTER
10 E. FOURTH STREET
P.O. BOX 113
FREDERICK, MD 21705-0113

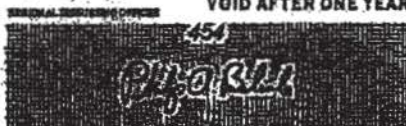
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VENDOR I.D.
NUMBER: 093264459

AGENCY NAME
AND BILLING
ADDRESS: FCC
445 12TH ST, S.W. 1A636
WASHINGTON, D.C.
20554

U.S. TREASURY REG. SAN FRANCISCO, CA
FINANCIAL CENTER:

CHECK NUMBER
3151-04845300

CHECK AMOUNT
\$***3365.00

CHECK DATE
03-14-11

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